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IN THE

Supreme Court of the United States

October Term, 1968

Nos. 798, 997

UNITED STATES OF AMERICA,

Petitioner,

v.

MONTGOMERY COUNTY BOARD OF EDUCATION, *et al.*,

and

ARLAM CARR, JR., *et al.*,

Petitioners,

v.

MONTGOMERY COUNTY BOARD OF EDUCATION, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONERS ARLAM CARR, JR., ET AL.

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Opinions Below

The opinion and order of the district court of February 24, 1968 (R.[1] 404), is reported at 289 F. Supp. 647 and

[1] References to the record "R." throughout the brief refer to the pagination in the original record which is indicated by appropriate notations throughout the printed Appendix. To expedite filing of the brief and appendix and ready the case for consideration at an earlier date the brief and appendix were printed simultaneously thereby precluding references herein to the appendix pages. However the index to the Appendix includes an index to original page numbers, which, as noted above, appear throughout the appendix on each document.

the supplemental order entered March 2, 1968 (R. 430), is at 289 F. Supp. 657. Another supplemental order of March 2, 1968 (R. 428), is unreported. The majority opinion of August 1, 1968, by the panel of the Court of Appeals (by Circuit Judge Gewin, with District Judge Elliott concurring) is reported at 400 F.2d 1. The dissenting opinion of October 21, 1968, by Judge Thornberry is reported at 402 F.2d 782. The order of the Court of Appeals of November 1, 1968, denying rehearing and rehearing *en banc* by an equally divided court, is at 402 F.2d 784. The opinion dissenting from the denial of rehearing *en banc* (by Chief Judge Brown, with the concurrence of Judges Wisdom, Thornberry, Goldberg and Simpson) is at 402 F.2d 784. Judge Dyer also dissented from the denial of rehearing *en banc* without opinion at 402 F.2d 787.

Prior reported opinions and orders of the district court at earlier stages of the case are reported as follows: (a) July 31, 1964, 232 F. Supp. 705, R. 98; (b) May 18, 1965, 10 Race Rel. L. Rep. 582, R. 191; (c) March 22, 1966, 253 F. Supp. 306, R. 274; (d) August 18, 1966, 11 Race Rel. L. Rep. 1716, R. 285; (e) June 1, 1967, 12 Race Rel. L. Rep. 1200, R. 364.

Jurisdiction

The judgment of the Court of Appeals was entered on August 1, 1968; rehearing was denied November 1, 1968. The petition for certiorari was filed in No. 798 on December 4, 1968; and in No. 997 on January 30, 1969. Certiorari was granted on March 3, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Question Presented

Whether in a school district formerly segregated by law into a dual system of separate white and Negro schools, where only slight desegregation has been achieved despite litigation begun in 1964, and where a trial court determined that to "pass tokenism" it was necessary to define the goal of faculty desegregation as the achievement in each school of a ratio of white to Negro teachers substantially the same as the system-wide ratio, it was error for the Court of Appeals to:

(a) strike down the trial court's numerical ratios and leave the goal of faculty desegregation entirely undefined;

(b) refuse to set a target date for full faculty desegregation;

(c) refuse to require that faculties in new schools be established on a completely desegregated basis.

Constitutional Provisions Involved

This case involves the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

Statement

1. Introduction.

This is a public school desegregation suit presenting issues relating to the obligation of the Montgomery County, Alabama, public school system to desegregate school faculties. The school board appealed seeking reversal of a desegregation order entered February 24, 1968, and amended March 2, 1968, by District Judge Frank M. Johnson, Jr. By a vote of 2-1, a panel of the Court of Appeals

(Circuit Judge Gewin and District Judge Elliott) modified the order and eliminated certain provisions relating to faculty desegregation. Circuit Judge Thornberry dissented from the modifications of the faculty integration order. A petition for rehearing *en banc* was denied by an equally divided vote of 6-6, with one Judge not participating due to illness.

In No. 997, the Negro pupils and parents who commenced the litigation in 1964 seek to reinstate, with some modifications, the district court order regarding faculty. In No. 798 another petition for certiorari seeking essentially similar relief has filed by the United States which has participated in the case throughout by order of the District Court.

2. Proceedings During 1964.

The complaint (R. 1-8), filed by a group of Negro pupils and parents May 11, 1964, alleged that the Montgomery County, Alabama school system was operated on a racially segregated basis. It was alleged that Negro students were assigned to schools with only Negro students and faculties (R. 4). The relief sought included an injunction against segregated faculty assignments (R. 7).

An opinion by the district court July 31, 1964, noted that the system, which embraces the City of Montgomery and surrounding rural areas, served about 25,000 white children and 15,000 Negro children (R. 100). The judge found there was "a dual school system based upon race and color" and that defendants "operate one set of schools to be attended exclusively by Negro students and one set of schools to be attended exclusively by white students" (R. 100). The judge wrote that: "The evidence further reflects that the teachers are assigned according to race; Negro teachers are assigned only to schools attended by Negro students and white teachers are assigned only to schools attended by white

students" (R. 100). The court observed: "Even the substitute teachers' list and attendance records reflect these distinctions based upon race" (R. 101). Finding that ten years had elapsed since *Brown* v. *Board of Education*, 347 U.S. 483 (1954), without any action to desegregate the schools, the court ordered that desegregation begin in September 1964 in grades 1, 10, 11 and 12. But, the court made no order with respect to faculty integration. Thereafter, 29 Negro pupils sought transfers to white schools in September 1964. The school board, using the Alabama School Placement Law, denied the requests of 21 and admitted the remaining 8 Negroes to white schools (R. 112). The court refused to order the admission of the rejected Negro transfer applicants (R. 148).

3. Proceedings During 1965.

On January 15, 1965, the school board filed a proposed desegregation plan as required by the judge (R. 155). The proposed plan made no mention of faculty desegregation and plaintiffs objected on that ground among others (R. 169). On May 18, 1965, the trial judge approved the proposed plan with amendments to require desegregation in grades 1, 2, 9, 10, 11 and 12 in September 1965 (R. 191). Again the court entered no order with respect to faculty desegregation, but did order that a plan for "complete elimination of the biracial school system within a reasonable time" be filed in January 1966.[2]

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[2] In announcing his ruling from the Bench, May 5, 1965, Judge Johnson said: "The defendants should be ordered to file their plan for completion of the desegregated system, including abolition of the dual school or biracial school system, which of course still exists. I am not naive enough to believe that desegregation of certain grades by transfer, such as we are doing here, is full compliance with what the law eventually envisions and requires, but I recognize that it is a transition period, and I think that this is reasonable for the facts in this case and the circumstances existing in this particular school district at this time" (R. 444).

In August 1965 the school board reported that it had accepted 18 of 49 Negro applicants to white schools (R. 195). The plaintiffs again objected to the denial of transfer requests, but the court upheld the board's denials of all except 6 applicants who were ordered admitted (R. 232-234).

4. Proceedings During 1966.

On January 14, 1966, the board filed another desegregation plan making no mention of faculty desegregation (R. 250). Again plaintiffs objected to the lack of faculty desegregation (R. 265) and this time the United States made a similar objection (R. 261). Plaintiffs specifically relied on this Court's faculty desegregation decisions in *Bradley* v. *School Board,* 382 U.S. 103 (Nov. 1965) and *Rogers* v. *Paul,* 382 U.S. 198 (Dec. 1965).

On March 22, 1966, the court entered another desegregation order (R. 274), this time requiring a "freedom of choice" plan generally following guidelines of the Department of Health, Education, and Welfare (HEW) (R. 270). This order required desegregation of all grades except 5 and 6 in September 1966, and for those grades to be desegregated in September 1967. It directed the closing of several small, inadequate all-Negro schools.

For the first time, the March 22, 1966, order also required faculty desegregation. It ruled that race and color were not to be factors in faculty assignments except to eliminate the effects of past discrimination. It ordered that assignments be made so that each school's "faculty . . . is not composed of members of one race." Job applicants were ordered to be informed of the new policy, and the administration was ordered to encourage staff transfers to promote integration. The school administration, in response, made tentative arrangements to place 4 white teachers in black

schools and 4 black teachers in white schools (R. 455). However, after these plans were made, the trial judge, on his own motion on August 18, 1966, rescinded the requirement and postponed faculty integration another year (R. 285). The judge relied on a Fifth Circuit opinion which ordered faculty integration for Mobile, Alabama to begin in 1967.[3]

5. Proceedings During 1967.

On April 11, 1967, plaintiffs moved for modification of the desegregation plan to conform to the circuit-wide requirements of *United States* v. *Jefferson County Board of Education,* 372 F.2d 836 (5th Cir. 1966), *aff'd en banc,* 380 F.2d 385 (5th Cir. 1957), *cert. denied,* 389 U.S. 840 (1967). Judge Johnson ordered the board to show cause why it should not adopt a plan to conform to *Jefferson, supra,* and to the plan ordered by a three-judge court for 99 Alabama counties in *Lee* v. *Macon County Board of Education,* 267 F. Supp. 458 (M.D. Ala. 1967), *aff'd sub nom. Wallace* v. *United States,* 389 U.S. 215 (1967).[4]

On June 1, 1967, the court entered an order conformable to *Jefferson, supra,* and *Lee, supra* (R. 364). The provision for faculty desegregation, which is quoted in full in the

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[3] *Davis* v. *Board of School Commissioners of Mobile,* 364 F.2d 896 (5th Cir., 1966).

[4] The *Lee* opinion recites in detail the background of official resistance by the Governor of Alabama and state education officials to prevent public school desegregation in the State. The three-judge court found that the desegregation efforts of Negroes in Alabama "have met the relentless opposition of these defendant state officials" (267 F. Supp. at 465; R. 318). The opinion recites in detail one series of episodes in August 1966 when the State Superintendent of Education and Governor George C. Wallace worked to prevent faculty desegregation in Tuscaloosa County (267 F. Supp. at 469). The court found that these "state officials also made it clear that similar measures would be taken in other communities if Negro teachers were assigned to teach white students" (*id.*).

footnote below,[5] adopted the objective that "the pattern of teacher assignment to any particular school shall not be

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[5] "VI

"FACULTY AND STAFF

"A. *Faculty Employment and Assignment.* Race or color will not be a factor in the hiring, assignment, reassignment, promotion, demotion or dismissal of teachers and other professional staff members, including student teachers, except that race will be taken into account for the purpose of counteracting or correcting the effect of the past segregated assignment of teachers in the dual system. Teachers, principals, and staff members will be assigned to schools so that the faculty and staff is not composed exclusively of members of one race. Wherever possible, teachers will be assigned so that more than one teacher of the minority race (white or Negro) will be on a desegregated faculty. The school board will take positive and affirmative steps to accomplish the desegregation of its school faculties, including substantial desegregation of faculties in as many of the schools as possible for the 1967-68 school year, notwithstanding that teacher contracts for the 1967-68 or 1968-69 school year have already been signed and approved. The objective of the school system is that the pattern of teacher assignment to any particular school shall not be identifiable as tailored for a heavy concentration of either Negro or white pupils in the school. The school system will accomplish faculty desegregation in a manner whereby the abilities, experience, specialties, and other qualifications of both white and Negro teachers in the system will be, insofar as administratively feasible, distributed evenly among the various schools of the system.

"B. *Dismissals.* Teachers and other professional staff members will not be discriminatorily assigneg, dismissed, demoted, or passed over for retention, promotion, or rehiring on the ground of race or color. In any instance where one or more teachers or other professional staff members are to be displaced as a result of desegregation, no staff vacancy in the school system will be filled through recruitment from outside the system unless no such displaced staff member is qualified to fill the vacancy. If, as a result of desegregation, there is to be a reduction in the total professional staff of the school system, the qualifications of all staff members in the system will be evaluated in selecting the staff member to be released without consideration of race or color. A report containing any such proposed dismissals, and the reasons therefor, shall be filed with the Court, and copies served upon opposing counsel

identifiable as tailored for a heavy concentration of either Negro or white pupils in the school" (R. 370).

On August 17, 1967, the United States filed a motion to require further faculty desegregation in view of the fact that the school board planned to assign only 5 white teachers of 804 to two Negro high schools and 5 Negro teachers out of 554 to two predominantly white high schools (R. 376). The plaintiffs joined in the motion (R. 379), and the court held an evidentiary hearing September 5, 1967.

School Superintendent McKee testified that it was decided to limit faculty desegregation at the beginning to high schools because he anticipated less objection since one teacher would not have the pupils for as much of the day in high school classes (R. 459-460). He also decided to integrate faculties only in schools within the city limits because of the need for close supervision and special protection which was more difficult in sparsely settled areas of the county (R. 461). The superintendent said he was having some difficulty finding white teachers who would agree to assignments in Negro schools, although there was no difficulty finding Negroes willing to teach in white schools (R. 466, 469, 470). The superintendent had engaged 12 or

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within five (5) days after such dismissal, demotion, etc., is proposed.

"C. *Notice to New Staff Members.* In the recruitment and employment of teachers and other professional personnel, all applicants or other prospective employees will be informed that Montgomery County operates a racially desegregated school system and that members of its staff are subject to assignment in the best interest of the system and without regard to the race or color of the particular employee.

"D. *Encouragement of Voluntary Faculty Transfer.* The Superintendent of Schools and his staff will take affirmative steps to solicit and encourage teachers presently employed to accept transfers to schools in which the majority of the faculty members are of a race different from that of the teacher to be transferred."

13 white teachers for Negro schools, but only 5 of them actually finally accepted the assignment (R. 468). All 5 Negroes initially picked for white schools actually undertook such assignments (R. 468-469). Mr. McKee indicated that he had not assigned more Negro teachers, even though they were available, because he had not been able to get more whites to volunteer for assignments to Negro schools (R. 469), and he wanted to keep the number of Negroes and whites in balance (R. 481). The annual faculty turnover or replacement rate in Montgomery is about 10% of the total staff (R. 478).

At the end of the hearing the court heard arguments, but took no action to make a ruling to affect the 1967-68 school year. The matter was kept under advisement without action by the court. During argument the judge made it plain that he had little "sympathy" with the request for relief at that time (R. 484).

6. Proceedings During 1968.

a. *In the District Court.* On February 1, 1968, the board filed a further pleading asserting it had 32 faculty employees teaching in schools predominantly of the other race, and that it planned further efforts for the coming year. The United States filed a motion (R. 389), joined by the private plaintiffs (R. 394), seeking further relief on the faculty question as well as relief on several other issues affecting desegregation. The court heard evidence February 9, 1968 (R. 495-694).

Superintendent McKee and Associate Superintendent Garrett testified that they had decided that in September 1968 they would assign Negro teachers to all of the white schools at once in "one fell swoop" (R. 556, 579). Mr. Garrett described the plans for faculty desegregation in the following testimony:

Q. How many teachers do you estimate you will have in minority situations this coming year? A. Well, we have about thirty-five now. We are going to attempt—our plan is to try to get at least one into every junior high and every elementary, and then start—once we accomplish that, start around with the second one and the third one and so on, rather than to have three in one school and none in another.

Q. Well based on your— A. Roughly speaking, a minimum or—with thirty-five already there, we have fifty schools or thereabouts; I would say about a hundred or better.

Q. Based on your— A. I think that is practical; I believe we can accomplish that (R. 584).

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The Court: My understanding, now, you are going to have this next year teachers of the minority race in every school in your system?

Witness: As far as humanly possible.

The Court: And how many do you expect to have in your—in your elementary schools, a minimum per school?

Witness: Two, at least.

The Court: And how many in your junior high, your minimum?

Witness: Two; maybe more.

The Court: All right.

Witness: Depending on what we come—

The Court: Now, let's go to percentages; what percentage do you expect to have in your high schools?

Witness: I just don't know. We haven't actually discussed that up to this point. I—I couldn't say.

The Court: Well, your race—your student population is sixty-forty?

Witness: Yes, sir.

The Court: Ultimately, that will be your optimum if you are going to eliminate the racial characteristics of your school through faculty—

Witnes: (Nodded to indicate affirmative reply.)

The Court: —wouldn't it? It would have to be. (R. 598-599.)

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Q. Mr. Garrett, I believe you testified when I was examining you that you were going to have at least—at least one in each school, or am I wrong on that? A. I said we would try to start with one in every elementary school and then come back around with two, and if we were successful, maybe three; I don't have any preconceived notion about maximums, but I would rather have these distributed rather than to have three, say, in one school and none in another (R. 600).

Associate Superintendent Garrett, who was in charge of faculty assignments, testified that he did not know the goal of the court's prior faculty desegregation orders:

Q. As part of your duties, have you been given the responsibility, primarily, of carrying out faculty desegregation? A. Well, the superintendent has delegated the recommending of the best faculty members that I can come by, and desegregation is a large—our faculty is a large part of my responsibilities; not the only one, but that has been discussed and—with the Board and with the superintendent, and we have a plan to accomplish this, have been working on it all year.

Q. Well, under your plan, when do you estimate that faculty desegregation will be finally accomplished in terms of the objective of the court order removing—

A. Well, now, that is something I don't know, because I don't know what the objectives of the court order are. That has never been laid down in any percentage fashion that I know of. It says that you will have reasonable desegregation of faculty and that you will strive toward having each faculty not recognizable as being staffed for a particular race. That is what I get out of it.

Q. Well, let— A. So I—I can't—this court order is in fairly general terms; I can't answer that question.

Q. Well, you made the statement about having schools staffed so that they will not be recognizable as for a particular race; when do you expect that that will be accomplished? A. Well, that would depend on what the Board's definition of that is, the court's definition of that.

Q. Do you have a definition of that? A. Not at this point; we have discussed that many times, and I do not have a definition of—of what that would mean.

Q. No one has told you, given you a definition in terms of mechanics, in terms of numbers, none of your superiors? A. No, as far as I know, no other school personnel man in America has. I have talked to many of them. What we are striving to do is to make progress and keep going and hope that somewhere along the line we will have achieved the—what the court has in mind. But if you will look at that court order, you will see it doesn't lay down the precise terms exactly what that means; it is a broad definition.

(R. 585-587)

In a memorandum opinion filed February 24, 1968, the court made findings that there were still about 15,000 Negro children and 25,000 white children in the system; that only 550 Negro children were attending traditionally white schools and no whites were in the Negro schools under the

freedom of choice plan; that 32 classroom teachers were teaching pupils in schools predominantly of the opposite race; that the system employed about 550 Negro teachers and 815 white teachers; that most faculty desegregation was in the high schools and there was little, if any, faculty desegregation in the county's rural schools (R. 406). The court also noted that the vast majority of teachers newly hired after the June 1, 1967, faculty desegregation order, were still assigned to schools where their race was in the majority; that no Negro has yet been a substitute in a white school; that during a semester where white substitute teachers were employed 2,000 times, only 33 white substitutes were employed in Negro schools; that there was "no adequate program for the assignment of student teachers on a desegregated basis"; and that there was no faculty desegregation in night schools (R. 406-407). The court concluded: "The evidence does not reflect any real administrative problems involved in immediately desegregating the substitute teachers, the student teachers, the night school faculties, and in the evolvement of a really legally adequate program for the substantial desegregation of the faculties of all schools in the system commencing with the school year 1968-69" (R. 407).

Judge Johnson, during the hearing, in a colloquy with Superintendent McKee, expressed the position, "I have gone along with this transition business for a good long while, but we have passed the transition period" (R. 544). Finding that the board had "failed to discharge the affirmative duty . . . to eliminate the . . . dual school system," the court held it was "necessary and entirely appropriate to establish now more specific requirements governing minimum amounts of progress in the future . . ." (R. 409).

The order of February 24, 1968 (R. 413-414), as amended (R. 429), supplemented the desegregation plan approved

June 1, 1967. The order, which is quoted below,[6] defined the objective of eliminating the racial identifiability of school

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[6] "I

"FACULTY AND STAFF

"A. *Statement of Objective.* In achieving the objective of the school system, that the pattern of teacher assignments to any particular school shall not be identifiable as tailored for a heavy concentration of either Negro or white pupils in the school, the school board will be guided by the ratio of Negro to white faculty members in the school system as a whole.

"The school board will accomplish faculty desegregation by hiring and assigning faculty members so that in each school the ratio of white to Negro faculty members is substantially the same as it is throughout the system. At present, the ratio is approximately 3 to 2. This will be accomplished in accordance with the schedule set out below.

"B. *Schedule for Faculty Desegregation.* 1. 1968-69. At every school with fewer than 12 teachers, the board will have at least one full-time teacher whose race is different from the race of the majority of the faculty and staff members at the school.

"At every school with 12 or more teachers, the race of at least one of every six faculty and staff members will be different from the race of the majority of the faculty and staff members at the school. This Court will reserve, for the time being, other specific faculty and staff desegregation requirements for future years.

"C. *Means of Accomplishment.* If the school board is unable to achieve faculty desegregation by inducing voluntary transfers or by filing vacancies, then it will do so by the assignment and transfer of teachers from one school to another.

"D. *Substitute Teachers.* Commencing in September, 1968, with the 1968-69 school year, the ratio of the number of days taught by white substitute teachers to the number of days taught by Negro substitute teachers at each school during each semester will be substantially the same as the ratio of white substitute teachers to Negro substitute teachers on the list of substitute teachers at the beginning of the semester.

"Commencing with the 1968-69 school year, the board will not use an individual as a substitute teacher in the Montgomery Public Schools if he will consent to substitute only at predominantly white schools or only at predominantly Negro schools.

"E. *Student Teachers.* Commencing in September, 1968, with the 1968-69 school year, the ratio of white to Negro

faculties as requiring the assignment of faculty such that the ratio of Negro to white faculty members in each school would be substantially the same throughout the system. For the year 1968-69 the court ordered at least one minority race (white or black) teacher in each school with less than 12 teachers, and in larger schools at least one minority race teacher of every six teachers. The court reserved judgment on detailed requirements for future years. The court also ordered that substitute teachers, student teachers, and night school teachers should be assigned so that there was substantially the same racial ratio in each school.

On the school board's application for a stay pending appeal, a part of the faculty desegregation order was stayed by Judge Johnson.

b. *Action of the Court of Appeals.* On August 1, 1968, the Court of Appeals, by a divided vote, modified the faculty desegregation order.[7] The court struck from the decree all numerical ratios except the interim 1968-69 goal—a five-to-one ratio in large schools and a more liberal ratio in smaller schools—which was modified to read "*substantially* or *approximately* five to one" (emphasis added). The court also rejected the plaintiffs' argument that the trial court should have set a target date for full integration and should have required immediate total desegregation of faculties in several new schools to be opened in 1968.

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student teachers each semester in each school that uses student teachers will be substantially the same as the ratio of white and Negro student teachers throughout the system.

"F. *Night Schools.* Commencing June 1, 1968, the ratio of white to Negro faculty members at each night school will be substantially the same as the ratio of white to Negro faculty members throughout the night-school program."

[7] Trial court rulings pertaining to special efforts to desegregate a new high school were affirmed on appeal.

Judge Thornberry dissented, finding no basis in the record or the prior decisions for modifying the trial judge's experiment in establishing numerical ratios for faculty desegregation. Chief Judge Brown's dissent from the denial of rehearing *en banc* (joined in by Judges Wisdom, Thornberry, Goldberg and Simpson) argued that there was a need for specific numerical targets for faculty desegregation plans to define the goal of schools unidentifiable as to race, as well as a need for specific target dates for compliance.

Summary of Argument

This case involves issues of considerable practical importance to achieving transition from a state-imposed dual, segregated school system to a unitary, non-racial system as required by *Brown* v. *Board of Education*, 347 U.S. 483 (1954) (*Brown I*), 349 U.S. 294 (1955) (*Brown II*); and *Green* v. *County School Board*, 391 U.S. 430 (1968). The court below struck down the district court's attempt to define in meaningful terms the goal of *faculty* desegregation, an essential aspect of the over-all goal of a desegregated school system. See *Bradley* v. *School Board*, 382 U.S. 103 (1965); *Rogers* v. *Paul*, 382 U.S. 198 (1965). The district judge had ruled that in each school the ratio of white to Negro faculty members should be substantially the same as the ratio throughout the system which he found was at the time approximately 3 to 2.[8] By striking such "numerical ratios," the court below rejected this goal and left the faculty desegregation objective so vaguely defined as to impair the ability of district courts to assure substantial progress. Petitioners submit that the refusal to give meaningful definition to the objective of faculty desegregation, especially where the trial court found

[8] Comparable rulings were made with regard to night schools, and to student and substitute teachers. See n. 10, pp. 20-21, *infra*.

such definition necessary in order to avoid further delay by school authorities, is inconsistent with this Court's demand in *Green* v. *County School Board, supra,* 391 U.S. at 439, for desegregation plans that promise "realistically to work *now.*"

In addition to striking down the district court's attempt to define the goal of faculty desegregation in terms of a system-wide racial ratio, the court below made three significant subsidiary rulings. It failed, as did the trial court (except in the case of night schools, and student and substitute teachers), to set any target date for the achievement of full faculty desegregation. (After the trial court decision, but prior to the Court of Appeals decision, another panel of the Fifth Circuit set September 1970 as "C" —for "compliance"—day for full faculty desegregation. *United States* v. *Board of Education of the City of Bessemer,* 396 F.2d 44, 52 (5th Cir. 1968).) The court below also amended the trial judge's minimum interim requirement that schools with 12 or more faculty members begin the school year 1968-69 with at least one of every six faculty members of a race different from the majority, by adding the qualifying phrases "approximately" and "substantially." Finally, the court below upheld the trial court's failure to require that faculties in new schools be established on a completely desegregated basis.

Petitioners contend that under *Green* v. *County School Board, supra,* full faculty desegregation should be implemented *immediately* in all schools throughout the system. Therefore, while we believe that the court below erred in modifying the district's court's specific minimum *interim* goals, we do not consider it necessary to argue that point here. Petitioners further contend that the courts below erred in not requiring that faculties in *new* schools be established on a completely desegregated basis.

The issues in this case should be viewed in the practical context of Montgomery County, Alabama. When this law suit was filed in May 1964, ten years after *Brown I*, the public schools were still totally segregated. No progress had been made voluntarily. In Montgomery, as was true in a Virginia county brought before this Court last term: "Racial identification of the system's schools was complete, extending not just to the composition of student bodies . . . but to every facet of school operations—faculty, staff, transportation, extracurricular activities and facilities." *Green* v. *County School Board*, 391 U.S. 430, 435 (1968). As this Court stated in *Green*, "[t]he transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about . . ." (391 U.S. at 436). In Montgomery County, Alabama it became the task of District Judge Frank M. Johnson, Jr. to supervise that transition.

The very same month this case was filed, this Court declared in *Griffin* v. *School Board*, 377 U.S. 218, 234 (1964) that "the time for mere 'deliberate speed' has run out. . . ." Yet, for four more years the District Judge patiently permitted the respondent school board to delay desegregation with a variety of transitional devices until he finally decided "We have reached the point where we must pass 'tokenism.'" (R. 431). The beginning of faculty desegregation had been repeatedly postponed until September 1967, although petitioners sought such relief from the outset of the case. Even after this Court ruled in late 1965 that faculty segregation must be considered in connection with school desegregation plans, in *Bradley* v. *School Board*, 382 U.S. 103 (1965), and *Rogers* v. *Paul*, 382 U.S. 198 (1965), Judge Johnson felt constrained by a ruling of the Fifth Circuit involving Mobile, Alabama, to delay faculty integration in Montgomery County until 1967 (R. 285). Finally, after four years of litigation, at a 1968 hearing, Judge

Johnson warned the school officials that: "I have gone along with this transition business for a good long while, but we have passed the transition period" (R. 544). In his decision rendered February 24, 1968, amended March 2, 1968, Judge Johnson made findings regarding the inadequacy of steps taken by the school officials involved toward faculty desegregation, held that they had failed to eliminate the dual school system and, indeed, had acted to perpetuate this system in the construction and location of new schools.[9] Petitioners believe that the need for specific directives defining the objective of faculty desegregation is evident from the record in this case, as well as from the long history of delay by school boards throughout the South in implementing school desegregation.

ARGUMENT

I.

The District Court Ruled Correctly in Defining the Goal of Faculty Desegregation as the Achievement in Each School of a Ratio of White to Negro Teachers Substantially the Same as the System-Wide Ratio.

District Judge Frank M. Johnson, Jr. ruled that in achieving the objective of faculty desegregation, the school board should "be guided by the ratio of Negro to white faculty members in the school system as a whole," and should hire and assign faculty members "so that in each school the ratio of white to Negro faculty members is substantially the same as it is throughout the system," which he found was at the time approximately 3 to 2. He made comparable rulings regarding substitute teachers, student teachers and night school faculty members.[10]

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[9] See opinion of the district court at 289 F. Supp. 647, 649-52.

[10] Order of February 24, 1968 (R. 413-414), as amended (R. 429). The relevant portions of the court's order regarding student and substitute teachers and night school faculty members follow:

The court below eliminated this attempt to define further the objective of faculty desegregation outlined in *United States* v. *Jefferson County Bd. of Educ.*, 372 F.2d 836 (5th Cir. 1966) (*Jefferson I*), *aff'd en banc*, 380 F.2d 385 (5th Cir. 1967) (*Jefferson II*), *cert. denied sub nom. Caddo Parish School Bd.* v. *United States*, 389 U.S. 840 (1967), as requiring that "the pattern of teacher assignment to any particular school not be identifiable as tailored for a heavy concentration of either Negro or white pupils in the schools" (380 F.2d at 394).

D. *Substitute Teachers.* Commencing in September, 1968, with the 1968-69 school year, the ratio of the numbers of days taught by white substitute teachers to the number of days taught by Negro substitute teachers at each school during each semester will be substantially the same as the ratio of white substitute teachers to Negro substitute teachers on the list of substitute teachers at the beginning of the semester. . . .

E. *Student Teachers.* Commencing in September, 1968, with the 1968-69 school year, the ratio of white to Negro student teachers each semester in each school that uses student teachers will be substantially the same as the ratio of white and Negro student teachers throughout the system.

F. *Night Schools.* Commencing June 1, 1968, the ratio of white to Negro faculty members at each night school will be substantially the same as the ratio of white to Negro faculty members throughout the night-school program.

The district court specifically found that:

> The evidence does not reflect any real administrative problems involved in immediately desegregating the substitute teachers, the student teachers, the night school faculties, and in the evolvement of a really legally adequate program for the substantial desegregation of the faculties of all schools in the system commencing with the school year of 1968-69. (289 F. Supp. at 6.9)

Respondents apparently have no specific objection to the provisions regarding substitute and student teachers, and night school faculty members, beyond their general objection to all mathematical ratios. Our discussion will therefore focus generally on the issue of the propriety of the district court's use of racial ratios, without any attempt to discuss separately regular faculty members, night school faculty members, student teachers and substitute teachers, since we believe no significantly different questions are involved in the use of the ratio formula in these different categories.

Petitioners contend that the district court's approximate proportional formula is the appropriate standard for measuring whether faculty segregation has been disestablished. Certainly this is true where, as here, the trial court finds that specific directives are necessary in order to accomplish desegregation, and that there are no significant administrative barriers to implementation of the formula.

At an earlier stage (in the June 1, 1967 order) Judge Johnson had defined the goal more generally, in language patterned on *Jefferson, supra.*

> The objective of the school system is that the pattern of teacher assignment to any particular school shall not be identifiable as tailored for a heavy concentration of either Negro or white pupils in the school. The school system will accomplish faculty desegregation in a manner whereby the abilities, experience, specialties, and other qualifications of both white and Negro teachers in the system will be, insofar as administratively feasible, distributed evenly among the various schools of the system. (R. 370)

This identical language was implicitly approved by this Court in *Wallace* v. *United States,* 389 U.S. 215 (1967), affirming per curiam *Lee* v. *Macon County Board of Education,* 267 F. Supp. 458, 489 (M.D. Ala. 1967). It was after this Court's action in *Wallace, supra,* on December 4, 1967 that Judge Johnson entered the more specific order requiring that the white-Negro faculty ratio in each school be substantially the same as the system-wide ratio. For this relatively precise goal the Court of Appeals substituted only vague generalities:

> There must be a good faith and effective beginning and a good faith and effective effort to achieve faculty and staff desegregation for the entire system. . . .

> It is hoped and believed that experience will teach effective ways and means of achieving an ideal racial balance . . . They [school boards] have the responsibility and should exercise the ingenuity to achieve a proper racial balance (400 F.2d at 9.)

A failure to give any more meaningful definition to the goal of faculty desegregation will leave school boards and trial judges confused as to the ultimate goal to be achieved, and justify those officials who resist desegregation in construing the goal as requiring no more than tokenism. This is illustrated by the record in this case. As the dissenting opinion to the 5th Circuit denial of rehearing *en banc* pointed out:

> Superintendent Garrett explicitly states that he does not even know what the objectives of the earlier District Court order are, when faculty desegregation will be complete, and that he and the Board have been unable to arrive at a workable definition of the model decree's standard of a "faculty not recognizable as being staffed for a particular race."
>
> Specifics are needed. Specifics are needed by the school administrators. Specifics are needed by the Negroes who have waited these 14 years for "a bona fide unitary system where schools are not white schools or Negro schools—just schools"—and who must now wait for an undefined time for the tell-tale mark of segregated faculties to pass away. Specifics are needed by children, Negro and white alike, who are entitled to witness, feel, and participate in the continuing lesson of a constitutional order that is color free.[11] (402 F.2d at 785)

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[11] Even the court below noted that the testimony of school officials demonstrated the need for specific directives. At the hearing before the district court, Associate Superintendent W. S. Garrett,

In *Green* v. *County School Board*, 391 U.S. 430 (1968), this Court placed new emphasis on the end result of any desegregation plan. Yet the decision below defines no ascertainable goal toward which progress can be measured now or later. As the dissenting opinion of the Fifth Circuit denial of rehearing *en banc* points out:

> Loath as Judges are to articulate constitutional goals or actions, in the oft-disparaged mechanical terms of arithmetic, this is an area where it is not the spirit, but the bodies which count. Any less inevitably leaves performance to good faith. Good faith is, of course, needed. But good faith is not, and cannot be, the standard. Now, and each term, each school year it comes down to figures. The result is in figures. If the result is satisfactory it is because of numbers, not the effort or subjective motivation. If the result is unsatisfactory it is likewise because of numbers. The numbers—i.e. the numerical percentage ratios—need to be fixed. Once fixed, the Court can always determine whether a good faith effort of compliance has been made. But good faith there is relevant to compliance, not as an element in fixing the standard. (402 F.2d at 786)

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asked when he estimated that faculty desegregation would be accomplished, testified:

> A. Well, now, that is something I don't know, because I don't know what the objectives of the court order are. That has never been laid down in any percentage fashion that I know of.
>
> • • •
>
> A. . . . I can't—this court order is in fairly general terms; I can't answer that question.
>
> Q. Well, you made the statement about having schools staffed so that they will not be recognizable as for a particular race; when do you expect that that will be accomplished?
>
> A. Well, that would depend on what the Board's definition of that is, of the court's definition of that (R. 586).

Further, *Green* stressed the need to end school segregation *now*. Failure to adopt specific directives will, as argued above, only encourage delay that *Green* said could no longer be tolerated.

Petitioners contend that not only are specific directives necessary if the goal of faculty desegregation is to be achieved, but that the directives laid down by the district judge were the proper directives. The court below expressed distaste for stating the objective of faculty desegregation in mathematical ratios, but it suggested no other formulation. Nor have respondents, at any state in these proceedings, suggested any formulation that would require more than token desegregation. We submit that it is difficult if not impossible to suggest another formulation equally compatible with the constitutional command to eliminate the effects of school segregation formerly established by law, and to create in its place a unitary, non-racial system. *Brown* v. *Board of Education*, 347 U.S. 483 (1954) (*Brown I*), 349 U.S. 294 (1955) (*Brown II*); *Green* v. *County School Board*, 391 U.S. 430 (1968).

In ruling that the ratio of white to Negro faculty members in each school ought to approximate the system-wide white-Negro faculty member ratio, the district judge merely required what would presumably have resulted had teachers been assigned in the past on a non-racial, random basis. As pointed out by Judge Michie in *Kier* v. *County School Board*, 249 F. Supp. 239, 248 (W.D. Va. 1966), in imposing a similar formula,

> . . . [T]he order of the court is merely intended to give redress for former faculty segregation on the premise that, had there been no discrimination to begin with, the Negro teachers employed by the county would have been as evenly distributed throughout the

various schools in the system as, for want of a better analogy, those teachers with blue eyes or cleft chins.

Further, a requirement that the faculty in each school reflect the racial composition of the faculty of the entire system is the only practical way to ensure that "the pattern of teacher assignment to any particular school not be identifiable as tailored for a heavy concentration of either Negro or white pupils in the school." *United States* v. *Jefferson County Bd. of Educ., supra,* 380 F.2d at 394; *Lee* v. *Macon County Bd. of Educ.,* 267 F. Supp. 458, 489 (M.D. Ala.), *aff'd sub nom Wallace* v. *United States,* 389 U.S. 215 (1967). Indeed as we read it, the order approved by this Court in Wallace (quoted *supra* at p. 22), covering 99 Alabama counties, calls for a faculty desegregation plan where teachers of differing races and qualifications are "evenly distributed" among the various schools of a system. The order involved here merely defines that goal more precisely. It is only if the "identifiability" of faculties in individual schools is eliminated that a system based on freedom of choice can work to produce desegregation of student bodies as required by *Green* v. *County School Board,* 391 U.S. 430 (1968), since a faculty tailored for one race or another is obviously a significant choice-influencing factor. See *Lee* v. *Macon County,* 267 F. Supp. 458, 479 (1967).

Significantly, the action of the Fifth Circuit is in conflict with decisions in four other circuits approving faculty desegregation orders requiring that teachers of both races be distributed approximately evenly throughout the systems. See *Dowell* v. *School Board of Oklahoma City,* 244 F. Supp. 971, 978 (W.D. Okla. 1965), *aff'd,* 375 F.2d 158, 164, 167 (10th Cir. 1967), *cert. denied,* 387 U.S. 931; *Coppedge* v. *Franklin County Board of Education,* 273 F. Supp. 289, 300 (E.D. N.C. 1967), *aff'd* 394 F.2d 410 (4th Cir. 1968); *United States* v. *School District 151 of Cook County, Illinois,* 286 F. Supp. 786, 798, 800 (N.D. Ill. 1968), *aff'd,* 404 F.2d 1125 (7th Cir. 1968). The Eighth Circuit has said that the use of such a formula "comports with *Brown*" in *Kelley* v. *Altheimer School District,* 378 F.2d 483, 498, n. 24 (8th Cir. 1967); *cf. Yarbrough* v. *Hulbert-West Memphis School District,* 380 F.2d 962, 968-969 (8th Cir. 1967).

It is important to emphasize that the percentage goals adopted by the district court were sufficiently flexible to accommodate administrative difficulties. The goal was not an exact percentage but "substantially the same" ratio. Petitioners would have no objection to defining more precisely the area of leeway, as for example was done in *Dowell, supra,* where the court allowed a ten percent margin for individual school variations (375 F.2d at 164).

It is notable that the percentage formula was first proposed by an expert panel of educators and not by lawyers. *Dowell* was the first reported case in which a district court required that the percentage of Negro teachers in each school should approximate their percentage in the entire system. The court in *Dowell* made its ruling for the Oklahoma City system on the recommendations of a distinguished panel of educational administrators who devised the integration plan for that city at the court's invitation.

In concluding, it is important to note what the district court's formula does *not* do. It does not impose a requirement that the ratio of white to Negro faculty members in each school and in the entire system remain the same in the future as it is at present. It is therefore *not* necessary, under this formula, that any *particular* quota or percentage of Negroes (or whites) be on the faculty in each school. It is only necessary that the percentage in

each school approximate the percentage in the system as a whole, whatever that may be.

Nor does the district court's formula import any permanent notion of race or ratio consciousness into the school system. As the Court in *Kier* v. *County School Board,* 249 F. Supp. 239, 248 (W.D. Va. 1966) stated,

> . . . the order of the court to be entered here envisions no . . . permanent race consciousness. It is merely intended to give redress for former faculty segregation. . . .

The fact that racial ratios may be necessary and appropriate as remedial measures to disestablish a system formerly segregated by law does not mean that once such disestablishment has been achieved such ratios would be either necessary or appropriate. Finally, approval of the use of such percentages as remedial measures to assure the "disestablishment of state-established segregated school systems," *Raney* v. *Board of Education,* 391 U.S. 443, 449 (1968), offends no constitutional rule against consideration of racial factors. *United States* v. *Jefferson County Board of Education,* 372 F.2d 836, 876 (5th Cir. 1966), adopted *en banc,* 380 F.2d 385, *cert. denied,* 389 U.S. 840 (1967); *Wanner* v. *County School Board of Arlington County,* 357 F.2d 452 (4th Cir. 1966).

II.

Full Faculty Desegregation Should Be Immediately Implemented.

Neither the district court nor the Court of Appeals established any deadline for achieving full desegregation of the regular school faculties. And they refused to order that faculties in new schools be established from the beginning on a desegregated basis.

Petitioners contend that it is essential that some date for compliance with the goal of faculty desegregation be clearly established if defining the goal is to ensure progress toward it. To tell school boards that ultimately they must establish a certain Negro-white faculty ratio but leave them free to determine the pace at which to approach that ratio would be meaningless. Certainly in the Fifth Circuit, in light of *United States* v. *Board of Educ. of Bessemer*, 396 F.2d 44 (5th Cir. 1968), a case decided after the district court's ruling, the date for ultimate compliance can be no later than the beginning of school year 1970-71. See also *United States* v. *Greenwood Municipal Separate School District* (5th Cir. No. 25714, Feb. 4, 1969). Indeed, respondents concede as much in their Brief in Opposition to the Petition for Certiorari, No. 798.

However, petitioners contend that under this Court's decision in *Green* v. *County School Board*, 391 U.S. 430, 438, 439 (1968), compliance with the goal of full faculty desegregation should be immediately required.[12] In *Green*,

[12] Petitioners recognize that there may be instances, perhaps in small schools, in which immediate implementation of the goal of faculty desegregation would not be practicable. Exceptions from the general rule could, of course, be made in such cases. But a heavy burden should be on the school officials to make a showing in each case that such an exception is necessary.

this Court ruled that in effecting the transition to a unitary, non-racial system, "delays are no longer tolerable," and "the burden on a school board is to come forward with a plan that promises realistically to work, and promises realistically to work *now*." And *Green* made no distinction between faculty and student desegregation. There is no indication in this record that compliance by the opening of school year 1969-70 would not be feasible. The district court failed to set a timetable on the basis of a philosophy of "gradualism" completely inconsistent with this Court's subsequent decision in *Green, supra*.[13] Since *Green*, the Fifth Circuit has held that schools must complete full conversion to a unitary, non-racial system by the beginning of school year 1969-70 at the latest, and has specifically insisted that plans provide for the elimination of all-Negro schools, as well as predominantly white schools, in which only a small fraction of Negroes are enrolled. *Adams* v. *Mathews*, 403 F.2d 181 (5th Cir. 1968); *United States* v. *Greenwood Municipal Separate School District* (5th Cir. No. 25714, February 4, 1969); *Henry* v. *Clarksdale Municipal School District* (5th Cir. No. 23255, March 6, 1969). Since the alleged difficulties in desegregating faculties have been primarily related to the segregated nature of student bodies, the Fifth Circuit's implementation of *Green's* required transition to "a system without a 'white' school and a 'Negro' school, but just schools" (391 U.S. at 442) ought to facilitate faculty desegregation.[14]

[13] "[G]radualism has been found to work quite successfully in the past in this type case and particularly with the Montgomery County Board of Education, and gradualism is contemplated by this Court in accomplishing this 'ultimate objective.'" (289 F. Supp. at 658).

[14] The district court had ruled that schools with 12 or more faculty members begin the school year 1968-69 with at least one of every six faculty members of a race different from the majority. The Court of Appeals modified this in holding that "because of

Whatever the merits of requiring immediate compliance with the goal of faculty desegregation in *all* schools, there can be no question that the faculties of *new* schools ought be established on a completely desegregated basis. However, the court below upheld the district court's failure to require full faculty desegregation immediately in such schools. Neither court gave any adequate explanation. The Court of Appeals ruling was on the grounds that the district court had spoken approvingly of permitting the school board "to achieve the ultimate objective of a completely desegregated school system *gradually*. . . ." (400 F.2d at 9-10). But the district court discussed the benefits of gradualism in explaining its failure to set a deadline for faculty desegregation throughout the school system, not in the particular context of the new schools. Most traditional arguments for gradualism are inapplicable where new schools are concerned. No problems of transferring faculty members out of such schools are presented. Problems involved in creating new faculties are comparable to those of filling vacancies; courts traditionally have recognized the obligation to fill vacancies on a non-racial basis. Moreover, administrative problems are magnified by al-

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the difficulties inherent in achieving a precise five-to-one ratio, this part of the district court's order should be interpreted to mean *substantially or approximately* five to one" (400 F.2d at 8). Petitioners contend that this modification was clearly erroneous. While it is appropriate that the ultimate objective be defined as an approximate requirement, there is no reason that interim goals should not express fixed minimal requirements. Such requirements do not pose insuperable administrative problems by their rigidity because nothing prohibits having *more than* one of every six teachers of a minority race. And they may be necessary, as the district court apparently felt they were, to prod reluctant officials into action. However, since school year 1968-69 has by now almost come to a close, and since as we read *Green* v. *County School Board* (text, *supra*, pp. 29-30), full faculty desegregation is required *now*, the issue of interim targets for faculty desegregation no longer seems relevant.

lowing establishment of an essentially all-white (or all-Negro) faculty since school officials will be faced with the problem in future years of transferring out white (or Negro) teachers.[15]

In any event, since the district court found specifically that the manner in which the school board had constructed these schools was designed to perpetuate, and had the effect of perpetuating, the dual school system (289 F. Supp. at 652), full faculty desegregation should have been required immediately in these schools in order to counter school officials' attempts to establish the new schools as segregated institutions.

[15] Significantly, the 1968-69 figures show that in the three new schools named in the district court opinion—Crump, Jefferson Davis and Southlawn—there were as of September 15, 1968, a total of 9 Negro teachers assigned as against 48 white teachers. The individual ratios were, respectively, 1:10, 7:29 and 1:9. (Brief of Respondents in Opposition to Petition for Certiorari, No. 798; Appendix A.)

CONCLUSION

The trial court ruled correctly in defining the goal of faculty desegregation as the achievement in each school in the system of a ratio of white to Negro teachers substantially the same as the system-wide ratio. Under *Green* v. *County Board of Education*, 391 U.S. 430 (1968), compliance with this goal should be immediately required. Accordingly, the judgment below should be reversed.

Respectfully submitted,

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